

## APPENDIX C - EXAMPLES OF CONSULTATION

<u>EXAMPLE NUMBER</u>	<u>AGENCY</u>	<u>TYPE OF CONSULTATION</u>
1	NMFS	Reinitiation
2	NMFS	Internal
3	NMFS	Informal
4	NMFS	Jeopardy
5	NMFS & FWS	Joint NMFS & FWS: Combined Biological Opinion and Conference Opinion
6	FWS	Stand Alone Conference
7	FWS	Intra-Service
8	FWS	Intra-Service w/ Conference
9	FWS	No Jeopardy w/ Incidental Take + Plants
10	FWS	Conference on Incremental
11	FWS	Early
12	FWS	Emergency
13	FWS	Sample Administrative Record

[Note: These are not available in electronic format.]

## **APPENDIX D - FWS SOLICITOR OPINIONS**

### Secretarial Memoranda

- S-1 Office of Hearings and Appeals Authority on Biological Opinions Issued by the U.S. Fish and Wildlife Service Under Section 7 of the Endangered Species Act. Manuel Lujan January 7, 1993.
- S-2 Reaffirmation of above from Bruce Babbitt. April 20, 1993.

### Solicitor Opinions

NOTE: Included in this appendix are two lists (SO-A and SO-B) of legal opinions on sections 6, 7, and 9 of the Endangered Species Act, reviewed for a recent FOIA request.

- SO-A Opinions released to the requestors as public documents. These documents may be released to the public.
- SO-B Opinions that were, and are NOT to be, released to the public. If copies of any of these opinions are needed, requests should be sent through the Regional Office.
- SO-1 Fish and Wildlife Service Regulations Defining "Harm" under Section 9 of the Endangered Species Act. April 17, 1981.
- SO-2 HUD Delegation of Endangered Species Act Consultation Requirements. June 9, 1981.
- SO-3 Cumulative Effects to be considered Under Section 7 of the Endangered Species Act. August 27, 1981.
- SO-4 Request for Legal Opinion Concerning Section 7 Consultation for Mining Claim Land Patented by the BLM (Bureau of Land Management) March 1, 1990.
- SO-5 The Legal Sufficiency of the Biological Opinion for Inner-Perimeter Road, Lowndes County, Georgia. July 9, 1992.
- SO-6 Permitted Incidental Take of Migratory Birds Listed Under the Endangered Species Act. February 9, 1996 memo with attached February 5, 1996, opinion.
- SO-7 Conner v. Burford, January 13, 1988.
- [Note: These opinions are not available in electronic format.]

## **APPENDIX E - FWS INTRA-SERVICE CONSULTATION HANDBOOK**

**ENDANGERED SPECIES ACT**

**U.S. FISH AND WILDLIFE SERVICE  
FINAL INTRA-SERVICE CONSULTATION HANDBOOK**

U.S. FISH AND WILDLIFE SERVICE

WASHINGTON D.C.

MARCH 1998

## TABLE OF CONTENTS

	Page
GOALS .....	E-2
LISTED, PROPOSED, AND CANDIDATE SPECIES INFORMATION ..	E-3
FISH AND WILDLIFE SERVICE ACTIONS .....	E-3
GLOSSARY .....	E-6
BASIC PROCEDURES AND RESPONSIBILITIES .....	E-17
OTHER INTRA-SERVICE CONSULTATION CONSIDERATIONS ...	E-23
APPENDICES	
Appendix 1 - Examples of Step-By-Step Procedures for Intra-Service Section 7 Concurrence, Formal Consultation, and Conference .....	E-25
Appendix 2 - Intra-Service Section 7 Biological Evaluation Form With Instructions .....	E-28
FIGURE	
E-1. Intra-Service Consultation or Conference Process .....	E-18

## GOALS

Internal Fish and Wildlife Service (Service) actions involving listed, proposed, and candidate species will promote the conservation of those species to the greatest extent practical under Federal law. Use the Service's Ecosystem Approach to Fish and Wildlife Conservation as the overlying theme during the internal consultation process. Although including candidate species is not required by law, it is Service policy to consider candidate species when making natural resource decisions. Therefore, candidate species will be considered for all intra-Service consultations. This species conservation will be accomplished by ensuring that Service-sponsored, authorized, or funded programs:

- o use the best scientific and commercial information available for all section 7 evaluations, including approved recovery plans, to assist Service decision makers;
- o provide the benefit of the doubt to the species if important scientific data are lacking;
- o ensure adequate protection through a buffer (degree of safety to the species) so that subsequent chance or recurring events (e.g., drought, fire, flooding, hurricanes, chemical spills, etc.) are not allowed to jeopardize the continued existence of these species;
- o promote and expand the species' opportunities for survival and recovery;
- o involve State and tribal fish and wildlife agencies in the intra-Service consultation process by keeping them informed of proposed Federal actions undergoing consultation, by obtaining information from the State and tribal agencies in the preparation of Biological Opinions, and by recommending that Federal agencies provide State and tribal agencies copies of Biological Opinions; and
- o apply Secretary Babbitt's "Ten Principles for Federal Endangered Species Act Policy"
  1. Base decisions on sound and objective science
  2. Minimize social and economic impacts
  3. Provide quick, responsive answers and certainty to landowners
  4. Treat landowners fairly and with consideration
  5. Create incentives for landowners to conserve species
  6. Make effective use of limited public and private resources by focusing on groups of species dependent on the same habitat
  7. Prevent species from becoming endangered or threatened
  8. Promptly recover and de-list threatened and endangered species
  9. Promote efficiency and consistency

10. Provide State, tribal and local governments with opportunities to play a greater role in carrying out the Endangered Species Act (Act).

## **LISTED, PROPOSED, AND CANDIDATE SPECIES INFORMATION**

Knowledge of what species occur in an action area, including information on their life histories, is integral to an intra-Service section 7 consultation. Ecological Services Offices (ESOs<sup>1</sup>) are responsible for providing lists of endangered, threatened, proposed, and candidate species and critical habitats to Service programs within their jurisdictions. Other Service units with responsibility for managing proposed and candidate species (e.g., Refuges, Fish Hatcheries) are responsible for keeping ESO information bases updated for their lead species and critical habitats.

The Washington Office Division of Endangered Species will ensure that Regional Office endangered species programs are furnished regularly with updated lists of endangered, threatened, proposed, and candidate species and critical habitat designations. Regional Office endangered species programs will provide these lists to all Regional and Field Office programs on a regular basis. Additional species information, such as known species distributions and biological requirements, may be obtained from the ESOs with lead responsibilities for that species. The above responsibilities of the ESOs and other Service units do not remove Project Leaders from the responsibility to assess which listed, proposed, and candidate species occur within action areas, as well as any proposed or designated critical habitat.

## **FISH AND WILDLIFE SERVICE ACTIONS**

Following are examples of Service actions that may be subject to intra-Service section 7 consultation:

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<sup>1</sup> In this handbook, "ESO" includes the Regional or Washington Office Division of Endangered Species for intra-Service consultations conducted at those levels.

## **Ecological Services**

- Endangered species recovery plan implementation
- Endangered Species Act section 10 permits <sup>2</sup>
- Endangered species Safe Harbor Agreements
- Endangered species Habitat Conservation Plans
- Farm Bill activities
- Partners for Wildlife
- Contaminant cleanup, spills, response activities, remedial actions
- Superfund activities

Section 10(a)(1)(B) permits applications may include species that are not Service listed, proposed or candidate species. In this situation, the biologist conducting the consultation will assess these species in the same way as candidate species, that is, as if they were proposed for listing. They should be included in the incidental take permit, however, only if there is adequate information about the species to determine what the specific project-related effects will be.

## **Fisheries**

- Endangered species recovery plan implementation
- Fisheries and Wildlife Assistance projects
- Hatchery operations, endangered species projects, fish stocking, land acquisition, construction
- Fish management plans

## **Federal Aid**

- Wildlife Restoration Act projects
- Sportfish Restoration Act projects
- Endangered Species Act Section 6 projects (programmatic)
- Clean Vessel Act projects
- National Coastal Wetlands Planning, Protection and Restoration Act

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<sup>2</sup> Service activities such as research, marking, moving, and harassing that directly take endangered and threatened species may require a section 10(a)(1)(A) permit. This permit is subject to section 7 review and may require the issuance of a biological opinion, especially if takings are involved.



projects  
Partnerships for Wildlife Act projects

## **Refuges and Wildlife**

Endangered species recovery plan implementation  
Refuge operation and maintenance  
Refuge habitat management and improvement projects, public use  
programs, commercial activities, construction projects, land disposal  
North American Waterfowl Management Plan activities  
Pest control activities on refuge croplands

## **All**

Information transfer (e.g., a Service publication on use of rotenone  
should caution against use where vulnerable listed or candidate species occur) if it  
results in effects to listed species  
Challenge grants  
Partners in Flight

## GLOSSARY OF TERMS USED IN INTRA-SERVICE SECTION 7 CONSULTATIONS

The wording of these definitions has been modified slightly from the cited source to reflect an internal Service consultation rather than a consultation between the Service and another Federal agency.

**Act** - the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

**Action** - all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by the Service or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air. [50 CFR §402.02]

**Action area** - all areas to be affected directly or indirectly by the Service action and not merely the immediate area involved in the action. [50 CFR §402.02]

**Affect/effect** - to affect (a verb) is to bring about a change ("The proposed action is likely to adversely affect piping plovers nesting on the shoreline"). The effect (usually a noun) is the result ("The proposed highway is likely to have the following effects on the Florida scrub jay"). "**Affect**" appears throughout section 7 regulations and documents in the phrases "may affect" and "likely to adversely affect." "**Effect**" appears throughout section 7 regulations and documents in the phrases "adverse effects," "beneficial effects," "effects of the action," and "no effect." [Proper grammatical usage]

**Anticipated/allowable/authorized** - in incidental take statements, the Service determines the amount or extent of incidental take "anticipated" (expected) due to the proposed action or an action modified by reasonable and prudent alternatives. When writing incidental take statements, use only the phrase "anticipated" rather than "allowable" or "authorized," as the Service does not allow or authorize (formally permit) incidental take under section 7. [Clarification of usage]

**Applicant** - any person (an individual, corporation, partnership, trust, association, or any other private entity; or any officer, employee, agent, department, or instrumentality of the Federal Government, of any State, municipality, or political subdivision of a State, or of any foreign government; any State, municipality, or political subdivision of a State; or any other entity subject to the jurisdiction of the United States) [ESA §3(12)] who requires formal

approval or authorization from a Federal agency as a prerequisite to conducting the action. [50 CFR §402.02]

**Appreciably diminish the value** - to considerably reduce the capability of designated or proposed critical habitat to satisfy requirements essential to both the survival and recovery of a listed species. [Clarification of usage]

**Best available scientific and commercial data** - to assure the quality of the biological, ecological, and other information used in the implementation of the Act, it is the policy of the Service to: (1) evaluate all scientific and other information used to ensure that it is reliable, credible, and represents the best scientific and commercial data available; (2) gather and impartially evaluate biological, ecological, and other information disputing official positions, decisions, and actions proposed or taken by the Service; (3) document their evaluation of comprehensive, technical information regarding the status and habitat requirements for a species throughout its range, whether it supports or does not support a position being proposed as an official agency position; (4) use primary and original sources of information as the basis for recommendations; (5) retain these sources referenced in the official document as part of the administrative record supporting an action; (6) collect, evaluate, and complete all reviews of biological, ecological, and other relevant information within the schedules established by the Act, appropriate regulations, and applicable policies; and (7) require management-level review of documents developed and drafted by Service biologists to verify and assure the quality of the science used to establish official positions, decisions, and actions taken by the Service during their implementation of the Act. [59 FR 34271 (July 1, 1994)]

**Biological assessment** - information prepared by the Service to determine whether a proposed Service action is likely to: (1) adversely affect listed species or designated critical habitat; (2) jeopardize the continued existence of species that are proposed for listing or are candidates for listing; or (3) adversely modify proposed critical habitat. Biological assessments must be prepared for "major construction activities." The outcome of this biological assessment determines whether formal consultation or a conference is necessary. [50 CFR §402.02, 50 CFR §402.12]

**Biological opinion** - document which includes: (1) the opinion of the Service as to whether or not a Service action is likely to jeopardize the continued existence of listed species, or result in the destruction or adverse modification of designated critical habitat; (2) a summary of the information on which the opinion is based; and (3) a detailed discussion of the effects of the action on listed species or designated critical habitat. [50 CFR §402.02, 50 CFR §402.14(h)]

**Candidate species** - plant and animal taxa considered for possible addition to the List of Endangered and Threatened Species. These are taxa for which the Service has on file sufficient information on biological vulnerability and threat(s) to support issuance of a proposal to list, but issuance of a proposed rule is currently precluded by higher priority listing actions. [61 FR 7596-7613 (February 28, 1996)]

**Conference** - a process of early intra-Service cooperation involving informal or formal discussions between one program of the Service and another program of the Service pursuant to section 7(a)(4) of the Act regarding the likely impact of a Service action on proposed species, candidate species, or proposed critical habitat. Conferences are: (1) required for proposed Service actions likely to jeopardize proposed species, candidate species, or destroy or adversely modify proposed critical habitat; (2) designed to help Service programs identify and resolve potential conflicts between an action and species conservation early in a project's planning; and (3) to develop recommendations to minimize or avoid adverse effects to proposed species, candidate species, or proposed critical habitat. [50 CFR §402.02, §402.10]

**Conservation** - the terms "conserve," "conserving" and "conservation" mean to use, and the use of, all methods and procedures which are necessary to bring any endangered species or threatened species to the point at which the measures provided pursuant to [the] Act are no longer necessary. Such methods and procedures include, but are not limited to, all activities associated with scientific resources management such as research, census, law enforcement, habitat acquisition and maintenance, propagation, live trapping, and transplantation, and, in the extraordinary case where population pressures within a given ecosystem cannot be otherwise relieved, may include regulated taking. [ESA §3(3)]

**Conservation measures** - are actions to benefit or promote the recovery of listed species that are included by the Service as an integral part of the proposed Service action. These conservation measures will be taken by the Service to minimize, or compensate for, project effects on the species under review. These may include actions taken prior to the initiation of consultation, or actions which the Service has committed to complete in a biological assessment or similar document.

**Conservation recommendations** - the Services' non-binding suggestions resulting from formal or informal consultation that: (1) identify discretionary measures Service programs can take to minimize or avoid the adverse effects of a proposed action on listed or proposed species, candidate species, or to designated or proposed critical habitat; (2) identify studies, monitoring, or research to develop new information on listed, proposed or candidate species, or to designated or proposed critical habitat; and (3) include suggestions on how the Service can assist species conservation, as part of their action and in furtherance of their authorities under section 7(a)(1) of the Act. [50 CFR §402.02]

**Constituent elements** - physical and biological features of designated or proposed critical habitat essential to the conservation of the species, including, but not limited to: (1) space for individual and population growth, and for normal behavior; (2) food, water, air, light, minerals, or other nutritional or physiological requirements; (3) cover or shelter; (4) sites for breeding, reproduction, rearing of offspring, germination, or seed dispersal; and (5) habitats that are protected from disturbance or are representative of the historic geographic and ecological distributions of a species. [ESA §3(5)(A)(i), 50 CFR 424.12(b)]

**Critical habitat** - for listed species consists of: (1) the specific areas within the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, on which are found those physical or biological features (constituent elements) (a) essential to the conservation of the species and (b) which may require special management considerations or protection; and (2) specific areas outside the geographical area occupied by the species at the time it is listed in accordance with the provisions of section 4 of the Act, upon a determination by the Secretary that such areas are essential for the conservation of the species. [ESA §3 (5)(A)] Designated critical habitats are described in 50 CFR §17 and 226.

**Cumulative effects** - are those effects of future State or private activities, not involving Federal activities, that are reasonably certain to occur within the action area of the Service action subject to consultation. [50 CFR §402.02] This definition applies only to section 7 analyses and should not be confused with the broader use of this term in the National Environmental Policy Act or other environmental laws.

**Designated non-Federal representative** - the person, agency, or organization designated by the Service as its representative to conduct informal consultation or prepare a biological assessment. The non-Federal representative must be designated by giving written notice to the Director. If a permit or license applicant is involved and is not the designated non-Federal representative, then the applicant and the Service must agree on the choice of the designated non-Federal representative. [50 CFR §402.02, 50 CFR §402.08]

**Destruction or adverse modification of critical habitat** - a direct or indirect alteration that appreciably diminishes the value of critical habitat for both the survival and recovery of a listed species. Such alterations include, but are not limited to, alterations adversely modifying any of those physical or biological features that were the basis for determining the habitat to be critical. [50 CFR §402.02]

**Director** - the Service's regional director, or his/her respective authorized representative. [50 CFR §402.02]

**Distinct Population Segment** - "population," or "distinct population segment," are terms with specific meaning when used for listing, delisting, and reclassification purposes to describe a discrete vertebrate stock that may be added or deleted from the list of endangered and threatened species. The use of the term "distinct population segment" will be consistent with the Services' population policy. [61 FR 4722-4725 (February 7, 1996)]

**Early consultation** - a preliminary consultation requested by the Service on behalf of a prospective permit or license applicant prior to the filing of an application for a Service permit or license. [50 CFR §402.11]

**Effects of the action** - the direct and indirect effects of a Service action on the species or critical habitat, together with the effects of other activities that are interrelated or interdependent with that action. These effects are considered along with the environmental baseline and the predicted cumulative effects to determine the overall effects to the species for purposes of preparing a biological opinion on the proposed action. [50 CFR §402.02] The environmental baseline covers past and present impacts of all Federal actions within the action area. This includes the effects of existing Federal projects that have not yet come in for their section 7 consultation.

**Endangered species** - any species which is in danger of extinction throughout all or a significant portion of its range. [ESA §3(6)]

**Environmental baseline** - the past and present impacts of all Federal, State, or private actions and other human activities in an action area, the anticipated impacts of all proposed Federal projects in an action area that have already undergone formal or early section 7 consultation, and the impact of State or private actions that are contemporaneous with the consultation in process. [50 CFR §402.02]

**ESA** - the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*

**FWS** - the Fish and Wildlife Service.

**Federal agency** - any department, agency, or instrumentality of the United States. [ESA §3(7)]

**Fish or wildlife** - any member of the animal kingdom, including without limitation any mammal, fish, bird (including any migratory, nonmigratory, or endangered bird for which protection is also afforded by treaty or other international agreement), amphibian, reptile, mollusk, crustacean, arthropod or other invertebrate, and includes any part, product, egg, or offspring thereof, or the dead body or parts thereof. [ESA §3(8)]

**Formal intra-Service consultation** - a process between a Service program taking/authorizing an action and another Service program affected by that action that: (1) determines whether a proposed Service action is likely to jeopardize the continued existence of listed species or destroy or adversely modify designated critical habitat; (2) begins with the Service program taking the action providing a written request and submittal of a complete initiation package to the affected Service program; and (3) concludes with the issuance of a biological opinion and incidental take statement by the affected Service program. If a proposed Service action may affect a listed species or designated critical habitat, formal intra-Service consultation is required (except when the involved Service programs concur, in writing, that a proposed action "is not likely to adversely affect" listed species or designated critical habitat). [50 CFR §402.02, 50 CFR §402.14]

**Habitat Conservation Plan** - Under section 10(a)(2)(A) of the Act, a planning document that is a mandatory component of an incidental take permit application, also known as a Conservation Plan.

**Incidental take** - take of listed fish and wildlife species that results from, but is not the purpose of, carrying out an otherwise lawful activity conducted by a Federal agency or applicant. [50 CFR §402.02]

**Indirect effects** - those effects that are caused by or will result from the proposed action and are later in time, but are still reasonably certain to occur. [50 CFR §402.02]

**Informal intra-Service consultation** - an optional process that includes all discussions and correspondence between Service programs, prior to formal intra-Service consultation, to determine whether a proposed Service action may affect listed species or critical habitat. This process allows the Service to utilize its in-house expertise to evaluate a Service program's assessment of potential effects or to suggest possible modifications to the proposed action which could avoid potentially adverse effects. If a proposed Service action may affect listed species or designated critical habitat, formal intra-Service consultation is required (except when the involved Service programs concur, in writing, that a proposed action "is not likely to adversely affect" listed species or designated critical habitat). [50 CFR §402.02, 50 CFR §402.13]

**Interdependent actions** - actions having no independent utility apart from the proposed action. [50 CFR §402.02]

**Interrelated actions** - actions that are part of a larger action and depend on the larger action for their justification. [50 CFR §402.02]

**Is likely to adversely affect** - the appropriate finding in a biological assessment (or conclusion during informal consultation) if any adverse effect to listed species may occur as a direct or indirect result of the proposed Service action or its interrelated or interdependent actions, and the effect is not: discountable, insignificant, or beneficial (see definition of "is not likely to adversely affect"). In the event the overall effect of the proposed Service action is beneficial to the listed species, but is also likely to cause some adverse effects, then the proposed Service action "is likely to adversely affect" the listed species. If incidental take is anticipated to occur as a result of the proposed action, an "is likely to adversely affect" determination should be made. An "is likely to adversely affect" determination requires the initiation of formal intra-Service section 7 consultation. [Clarification of usage]

**Is likely to jeopardize proposed or candidate species/adversely modify proposed critical habitat** - the appropriate conclusion when the Service identifies situations where the proposed Service action is likely to jeopardize the continued existence of a species proposed for listing or a candidate species, or adversely modify an area proposed for designation as critical habitat. If this conclusion is reached, intra-Service conference is required.

**Is not likely to adversely affect** - the appropriate conclusion when effects on listed species are expected to be discountable, insignificant, or completely beneficial. **Beneficial effects** are contemporaneous positive effects without any adverse effects to the species. **Insignificant effects** relate to the size of the impact and should never reach the scale where take occurs. **Discountable effects** are those extremely unlikely to occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur. [Clarification of usage]

**Jeopardize the continued existence of** - to engage in an action that reasonably would be expected, directly or indirectly, to reduce appreciably the likelihood of both the survival and recovery of a listed species in the wild by reducing the reproduction, numbers, or distribution of that species. [50 CFR §402.02]

**Letter** - refers to all written correspondence, such as letters, memoranda, or electronic mail messages relating to a formal or informal consultation. [Clarification of usage]

**Listed species** - any species of fish, wildlife or plant which has been determined to be endangered or threatened under section 4 of the Act. [50 CFR §402.02]

**Major construction activity** - a construction project (or other undertaking having similar physical effects) which is a major Federal action significantly affecting the quality of the human environment as referred to in the National Environmental Policy Act (NEPA, 42 U.S.C. 4332(2)(C)) [50 CFR §402.02].



**May affect** - the appropriate conclusion when a proposed action may pose any effects on listed species or designated critical habitat. When the Federal agency (in this case the Service) proposing the action determines that a "may affect" situation exists, then the Service must then either initiate formal consultation or seek written concurrence from the involved Service programs that the action "is not likely to adversely affect" [see definition above] listed species. [Clarification of usage]

**Minor change rule** - when preparing incidental take statements, the Service must specify reasonable and prudent measures and their implementing terms and conditions to minimize the impacts of incidental take that do not alter the basic design, location, scope, duration, or timing of the action, and that involve only minor changes. [50 CFR §402.14]

**No effect** - the appropriate conclusion when the Service determines that a proposed Service action will not affect a listed species or designated critical habitat. [Clarification of usage]

**Occupied critical habitat** - critical habitat that contains individuals of the species at the time of the project analysis. A species does not have to occupy critical habitat throughout the year for the habitat to be considered occupied (e.g. migratory birds). Subsequent events affecting the species may result in this habitat becoming unoccupied. [Clarification of usage]

**Plant** - any member of the plant kingdom, including seeds, roots, and other parts thereof. [ESA §3(14)]

**Population** - "population" or "distinct population segment" are terms with specific meaning when used for listing, delisting, and reclassification purposes to describe a discrete vertebrate stock that may be added or deleted from the list of endangered and threatened species. The term "population" will be confined to those distinct population segments officially listed, or eligible for listing, consistent with section 4(a) of the Act and the Service's population policy. [61 FR 4722-4725 (February 7, 1996)]

**Preliminary biological opinion** - the opinion issued as a result of early consultation. [50 CFR §402.02]

**Programmatic consultation** - consultation addressing the Service's multiple actions on a program, regional or other basis. [Clarification of usage]

**Project Leader** - the first line supervisor and/or manager of the projects or programs under a specific area of Service responsibility.

**Proposed critical habitat** - habitat proposed in the Federal Register to be designated as critical habitat, or habitat proposed to be added to an existing critical habitat designation, under section 4 of the Act for any listed or proposed species. [50 CFR §402.02]

**Proposed species** - any species of fish, wildlife or plant that is proposed in the Federal Register to be listed under section 4 of the Act. [50 CFR §402.02]

**Reasonable and prudent alternatives** - recommended alternative actions identified during formal intra-Service consultation that can be implemented in a manner consistent with the intended purpose of the action, that can be implemented consistent with the scope of the Service's legal authority and jurisdiction, that are economically and technologically feasible, and that the Director believes would avoid the likelihood of jeopardizing the continued existence of listed species or the destruction or adverse modification of designated critical habitat. [50 CFR §402.02]

**Reasonable and prudent measures** - actions identified during formal intra-Service consultation the Director believes necessary or appropriate to minimize the impacts, i.e., amount or extent, of incidental take. [50 CFR §402.02]

**Recovery** - improvement in the status of listed species to the point at which listing is no longer appropriate under the criteria set out in section 4(a)(1) of the Act. [50 CFR §402.02]

**Recovery unit** - management subsets of the listed species that are created to establish recovery goals or carrying out management actions. To lessen confusion in the context of section 7 and other Endangered Species Act activities, a subset of an animal or plant species that needs to be identified for recovery management purposes will be called a "recovery unit" instead of a "population." [Clarification of usage]

**Section 4** - the section of the Endangered Species Act of 1973, as amended, outlining procedures and criteria for: (1) identifying and listing threatened and endangered species; (2) identifying, designating, and revising critical habitat; (3) developing and revising recovery plans; and (4) monitoring species removed from the list of threatened or endangered species. [ESA §4]

**Section 7** - the section of the Endangered Species Act of 1973, as amended, outlining procedures for interagency cooperation to conserve Federally listed species and designated critical habitats. Section 7(a)(1) requires Federal agencies to use their authorities to further the conservation of listed species. Section 7(a)(2) requires Federal agencies to consult with the Services to ensure that they are not undertaking, funding, permitting, or authorizing actions likely to jeopardize the continued existence of listed species or destroy or adversely

modify designated critical habitat. Other paragraphs of this section establish the requirement to conduct conferences on proposed species and candidate species; allow applicants to initiate early consultation; require FWS and NMFS to prepare biological opinions and issue incidental take statements. Section 7 also establishes procedures for seeking exemptions from the requirements of section 7(a)(2) from the Endangered Species Committee. [ESA §7]

**Section 7 consultation** - the various section 7 processes, including both consultation and conference if proposed or candidate species are involved. [50 CFR §402]

**Section 9** - the section of the Endangered Species Act of 1973, as amended, that prohibits the taking of endangered species of fish and wildlife. Additional prohibitions include: (1) import or export of endangered species or products made from endangered species; (2) interstate or foreign commerce in listed species or their products; and (3) possession of unlawfully taken endangered species. [ESA §9]

**Section 10** - the section of the Endangered Species Act of 1973, as amended, that provides exceptions to section 9 prohibitions. The exceptions most relevant to section 7 consultations are takings allowed by two kinds of permits issued by the Service: (1) scientific take permits and (2) incidental take permits. The Service can issue permits to take listed species for scientific purposes, or to enhance the propagation or survival of listed species. The Service can also issue permits to take listed species incidental to otherwise legal activity. [ESA §10]

**Service** - the U.S. Fish and Wildlife Service.

**Species** - includes any subspecies of fish or wildlife or plants, and any distinct population segment of any species of vertebrate fish or wildlife which interbreeds when mature. [ESA §3(16)]

**Survival** - For determination of **jeopardy/adverse modification**: the species' persistence as listed or as a recovery unit, beyond the conditions leading to its endangerment, with sufficient resilience to allow for the potential recovery from endangerment. Said another way, survival is the condition in which a species continues to exist into the future while retaining the potential for recovery. This condition is characterized by a species with a sufficient population, represented by all necessary age classes, genetic heterogeneity, and number of sexually mature individuals producing viable offspring, which exists in an environment providing all requirements for completion of the species' entire life cycle, including reproduction, sustenance, and shelter. [Clarification of usage]

**Take** - to harass, harm, pursue, hunt, shoot, wound, kill, trap, capture, or collect or attempt to engage in any such conduct. [ESA §3(19)] **Harm** is further defined by the Service to

include significant habitat modification or degradation that results in death or injury to listed species by significantly impairing behavioral patterns such as breeding, feeding, or sheltering. **Harass** is defined by the Service as actions that create the likelihood of injury to listed species to such an extent as to significantly disrupt normal behavior patterns which include, but are not limited to, breeding, feeding or sheltering. [50 CFR §17.3]

**Threatened species** - any species which is likely to become an endangered species within the foreseeable future throughout all or a significant portion of its range. [ESA §3(20)]

**Unoccupied critical habitat** - critical habitat not occupied (i.e., not permanently or seasonally occupied) by the listed species at the time of the project analysis. The habitat may be suitable, but the species has been extirpated from this portion of its range. Conversely, critical habitat may have been designated in areas unsuitable for the species, but restorable to suitability with proper management, if the area is necessary to either stabilize the population or assure eventual recovery of a listed species. As recovery proceeds, this formerly unoccupied habitat may become occupied.

Some designated, unoccupied habitat may never be occupied by the species, but was designated because it is essential for conserving the species because it maintains factors constituting the species' habitat. For example, critical habitat may be designated for an upstream area maintaining the hydrology of the species' habitat downstream. [Clarification of usage]

**Wildlife** - See "fish or wildlife".

## **BASIC PROCEDURES AND RESPONSIBILITIES**

The timeframes and data requirements in the following procedures are the same for all Federal agencies, and follow the section 7 consultation regulations at 50 CFR §402, except that as an internal policy established by the Director, Service actions shall include consideration of candidate species as though proposed for listing.

Ask yourself the following:

### **(1) IS THERE A FEDERAL ACTION?**

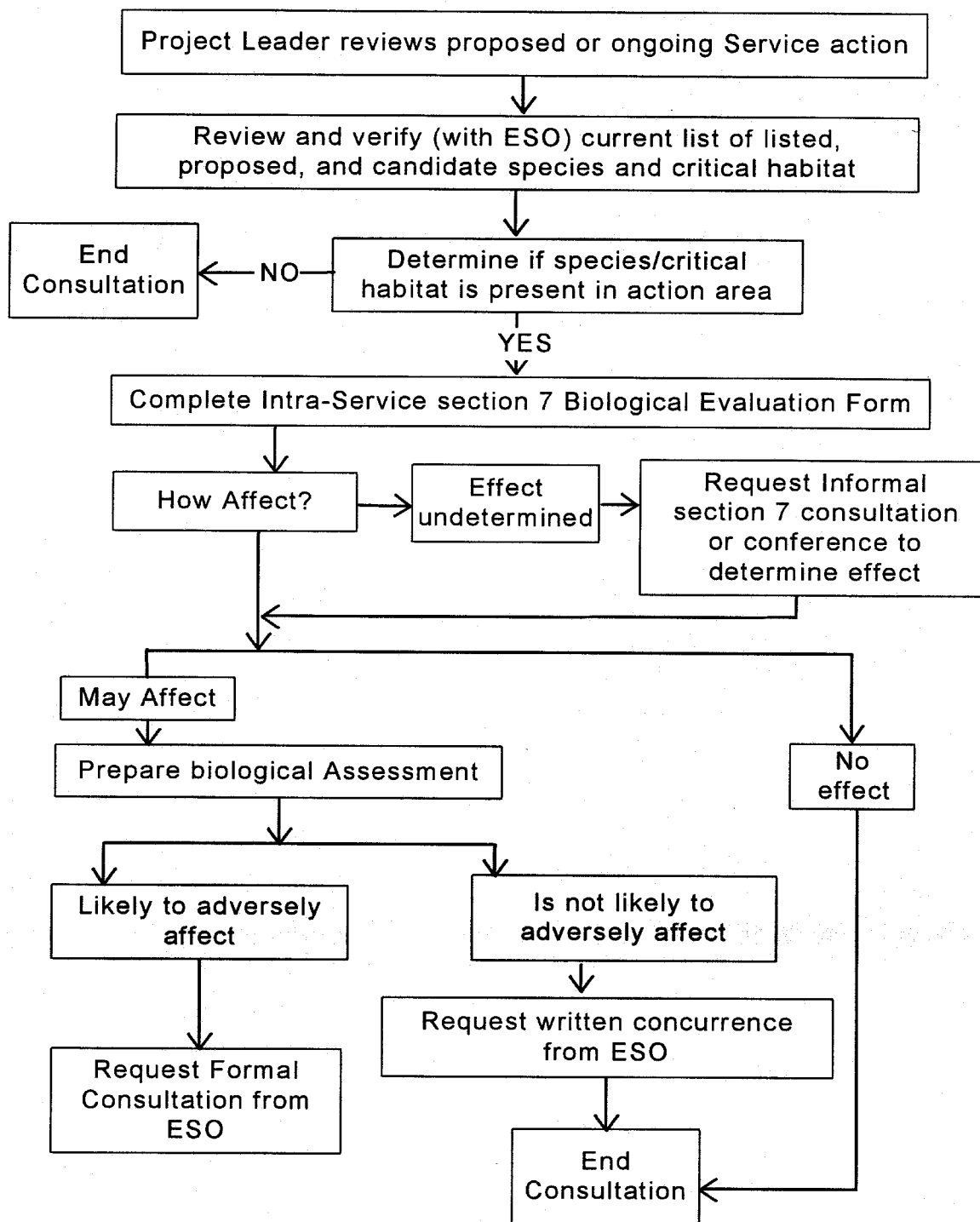
Federal actions include all activities or programs authorized, funded, carried out, or permitted -- in whole or in part -- by Federal agencies in the United States or on the high seas. Intra-Service consultations may consider either individual actions or a Service program as a whole. However, a programmatic consultation will not substitute for an individual project consultation, unless the programmatic analysis lays out the species-specific standards within which all individual activities will be conducted.

Example of a non-Federal action: Within a Service unit, an inholding of private party is undertaking an action affecting a listed, proposed, or candidate species pursuant to a private interest in land over which Service has no control.

### **(2) ARE LISTED, PROPOSED, OR CANDIDATE SPECIES OR THEIR HABITAT PRESENT?**

The Project Leaders must first determine whether candidate species, proposed, or listed species (or their habitats) occur -- or have the potential to occur -- in the action area. This may be done by reviewing agency records, contacting knowledgeable sources (State agencies, Natural Heritage Program offices, etc.), conducting surveys, and/or requesting a species list from the appropriate ESO. The ESOs are the primary contacts for intra-Service section 7 consultation. Project Leaders may contact the appropriate ESO to begin informal section 7 consultation or conference on the proposed action. ESO responsibilities include conducting informal section 7 consultation, assisting Project Leaders in evaluating effects of their proposed and existing actions, responding to species information requests, responding to concurrence requests, conducting informal conferences and issuing conference reports, and preparing draft biological and conference opinions.

**Figure E-1. Intra-Service Consultation or Conference Process.**



### **(3) IS THE PROPOSED FEDERAL ACTION A MAJOR CONSTRUCTION ACTIVITY?**

Major construction activities include dams, buildings, pipelines, roads, water resource developments, channel improvements, and other such projects that modify the physical environment and that constitute major Federal actions. Major construction activities do not include those activities that are exempted from NEPA review as a categorical exclusion for the Service under 516 DM 2.3A(2). As a rule of thumb, if an Environmental Impact Statement is required for the proposed action and construction-type impacts are involved, it is considered a major construction activity.

#### **3.a. Major construction activity**

For major construction activities, the Project Leader is required to request a species list from the ESO or submit a species list to the ESO for confirmation. When a species list is requested, the ESO has 30 days to respond. The species list is effective for 90 days. If either (1) listed, proposed, or candidate species and/or (2) proposed or designated critical habitat are present or suspected to be present, the Project Leader is required to begin a biological assessment. This assessment must be initiated within 90 days of receiving the list. It must be completed, along with a determination of the likely effects (if any) of the action, within 180 days; otherwise, the species list must be updated.

If the Project Leader determines that a listed species or its habitat does not occur in the action area, or does not have the potential to occur, and if the ESO concurs with that determination, a biological assessment is not required and the intra-Service section 7 process ends.

A biological assessment is not *required* if only proposed or candidate species or proposed critical habitat are present. However, a biological assessment is *recommended* for these species so that the Service can be proactive in conserving candidate/proposed species or proposed critical habitat, and an assessment will be required if the species is listed/critical habitat is designated before or during implementation of the proposed action.

#### **3.b. No major construction activity**

Even if the action is not a major construction activity, intra-Service consultation may be necessary. The Project Leader may initiate or continue informal consultation to determine if formal consultation is required. The Project Leader may submit a species list for confirmation or request a species list from the ESO. When the Project Leader determines that a listed species or its habitat does not occur or potentially occur in the action area, the intra-Service section 7 process ends.

If a listed, proposed, or candidate species, its habitat, or proposed or designated critical habitat is present, the Project Leader should determine whether the action "may affect" those species or habitat or may destroy or adversely modify critical habitat. Completing the **INTRA-SERVICE SECTION 7 BIOLOGICAL EVALUATION FORM** (hereafter referred to as "Service Evaluation Form" - see Appendix 2) will assist the Project Leader in determining the potential effect of the proposed action.

#### **(4) IS THERE A "MAY AFFECT" SITUATION?**

The Service Evaluation Form or a biological assessment, as appropriate, is used for informal analysis of all actions affecting species or critical habitat subject to intra-Service section 7 consultation. Review the instructions for this form for determinations of "no effect," "may affect," "is not likely to adversely affect," and "is likely to adversely affect."

In determining the potential effect of the action, the Project Leader needs to review enough information on the species and its habitat to assess whether the action may affect the species' population, reproductive capability, food supply, cover needs, pollinators, symbionts, predators/competitors, or other such biological factors. For designated or proposed critical habitat, the assessment should address the potential effect on important components of the critical habitat (some of which are identified as constituent elements) and the conservation role of the critical habitat unit.

When the Project Leader determines that the proposed action will have "no effect" on the listed, proposed, or candidate species or its habitat and will not destroy or adversely modify proposed or designated critical habitat, the intra-Service consultation/conference process ends. Concurrence from the ESO is not required, but if the ESO is aware of and disagrees with the no effect determination, a memorandum outlining the disagreement and requesting continued intra-Service consultation/conference will be provided to the Project Leader. If a high level of sensitivity or controversy is associated with the action or the species, written concurrence from the ESO is recommended.

Project Leaders should use the informal consultation process whenever possible. The Service Evaluation Form should be completed for this purpose. As required of all other Federal agencies, the Service program (i.e., Refuges, Federal Aid, Ecological Services, Fisheries, Management Assistance, Endangered Species, etc.) that initiates a new action or continues an existing activity is responsible for obtaining the best scientific and commercial information available to complete the intra-Service consultation. Much of the information may already be available through the ESO. The intra-Service consultation may require surveys in the project



area to determine species' presence and status, seasonal use pattern, condition of the species' habitat, juxtaposition to the action/activity, etc.

## **(5) WHAT ARE THE OPTIONS FOR "MAY AFFECT" SITUATIONS?**

When the Project Leader determines the action "may affect" a listed species, a designated or proposed critical habitat, or proposed or candidate species, the options are (1) to continue informal consultation with the ESO or (2) to initiate formal consultation or conference. The "may affect" evaluation looks not only at effects on the entire species or local management unit, but also considers the effect on individual members of the species. If even one individual may be affected, the biologist must conclude that there is a "may affect" situation. Project modifications agreed upon during informal consultation may result in a "no effect" determination, thus eliminating the need for formal consultation or conference.

When the Project Leader finds that the proposed action may affect, but is "not likely to adversely affect," listed, proposed, or candidate species, or designated or proposed critical habitats, a request for concurrence with that finding is sent to the appropriate ESO. The Project Leader can make such a finding only if all of the effects of the proposed action will be discountable, insignificant, or completely beneficial (see definition of "is not likely to adversely affect"). A copy of the Service Evaluation Form supporting the Project Leader's determination should be forwarded to the appropriate ESO within 30 days of that determination. The ESO will respond to the Project Leader's written request for concurrence within 30 days of receiving the request. Concurrence with the "not likely to adversely affect" finding completes the requirements for intra-Service section 7 consultation. If any adverse effect or any incidental take of listed species or critical habitat is likely to occur, formal consultation must be initiated; if any candidate or proposed species are likely to be jeopardized and if proposed critical habitat may be adversely modified, then conference is required.

Formal consultation must be conducted prior to issuing permits for the incidental take of listed species, even for activities conducted during recovery efforts for these species. These permits must include appropriate conditions to avoid or minimize incidental take, and to ensure the disposition of any dead or injured specimens in a way that preserves their potential use in other recovery activities.

## **(6) WHAT ARE THE PROCEDURES FOR FORMAL CONSULTATION OR FORMAL CONFERENCE?**

Once an ESO receives a Project Leader's written request for a formal intra-Service consultation or formal intra-Service conference, this stage of the process will be concluded within 90 days. After the consultation or conference is concluded, a biological opinion or conference report will be delivered by the ESO within an additional 45 days. Extensions are available only by mutual agreement.

These timetables begin when the ESO receives a written request and all the information needed to proceed. The information can be provided by means of (1) a Service Evaluation Form, (2) a biological assessment, or (3) a report containing the following data: (a) a description of the proposed action; (b) a description of the specific area that may be affected by the proposed action; (c) a description of any listed, proposed, or candidate species, or any designated or proposed critical habitat, that may be affected by the proposed action; (d) a description of how the proposed action may affect these species or habitats and an analysis of any cumulative effects in the action area; (e) relevant reports, including any environmental impact statement, environmental assessment, or biological assessment prepared; (f) any other relevant information available [taken from 50 CFR §402.14 (c)]. The ESO can assist in determining what type of data will be needed for the formal consultation or conference.

A biological opinion looks beyond the effects of the proposed action. It also considers the overall status of the species, and the environmental baseline and cumulative effects in the action area. Additionally, if incidental take is anticipated as a result of the proposed action, the incidental take statement that accompanies the biological opinion will lay out nondiscretionary reasonable and prudent measures to minimize that take, consistent with the requirements of sections 7(a)(2) and 7(b)(4).

Draft **jeopardy** and **adverse modification** biological opinions and conference reports will be forwarded by the ESO to the Regional Office Division of Endangered Species at least 2 weeks prior to the end of the 90-day consultation period. These biological opinions and conference reports must be signed by the Regional Director (if warranted). The Service Evaluation Form, along with other pertinent information, is transmitted with the draft biological opinion or conference report. The Project Leader is offered an opportunity to review the draft document when the draft determination is **jeopardy** and/or **adverse modification**, or when incidental take is anticipated. In these instances, it is beneficial to coordinate the development of reasonable and prudent alternatives and/or reasonable and prudent measures. If disagreements arise during this process, they can be elevated through the appropriate Assistant Regional Directors for resolution.

Consistent with current delegations of authority, Regional Directors sign intra-Service section 7 biological opinions and conference reports finding **jeopardy** or **adverse modification**. **Non-jeopardy/no adverse modification** biological opinions and conference reports can be

signed by the pertinent ESO supervisor, if the Regional Director has delegated that authority in his/her Region.

## **(7) WHAT ARE THE OPTIONS IF A JEOPARDY/ADVERSE MODIFICATION OPINION IS RECEIVED?**

If a final **jeopardy** or **adverse modification** biological opinion or conference opinion is issued, the Project Leader must notify the ESO of the final decision on the proposed action. The Project Leader has three options: (a) to implement the reasonable and prudent alternative(s) provided with the biological opinion; (b) to refrain from funding, approving, or undertaking the project; or (c) to apply for an exemption from section 7 of the Act. However, the Service (and the Department of the Interior) does not anticipate that an action proposed under its programs will ever justify an exemption application.

## **OTHER INTRA-SERVICE CONSULTATION CONSIDERATIONS**

The Service must be held to the same rigorous consultation standards that other Federal agencies are required to meet under section 7. An ESO cannot prepare the draft biological opinion, draft conference report, or concurrence document for its own action. Biological opinions required for section 10(a)(1)(B) permits are handled by separate organizational entities in the Regional Office's Division of Endangered Species.

This means, in part, that internal Service consultations under section 7 should be as impartial as possible. However, it is also important that a section 7 consultation does not result in otherwise avoidable delays when meeting target processing times. Such delays may result if the section 7 consultation is assigned to an office too far removed from the location and circumstances of the proposed action. In order to eliminate this problem, the biological opinion should be drafted by staff member(s) independent of the section 7 consultation, but who are familiar with the biological requirements of the species involved, and the geographic area of the proposed action.

In order to minimize possible biases, the biological opinion should not be drafted by the Service program taking the proposed action. Also, the Service program taking the proposed action should not be the program providing technical assistance to the applicant, if any. It is important that the staff member conducting the section 7 consultation be involved early in the development of the proposed action, so that the requirements of section 7 are addressed in the

proposed action. The Service also recommends that the biologist(s) that conduct the section 7 consultation and the biologist that provide technical assistance to the applicant, if any, should not have the same supervisor. This will help prevent any unintentional biases being shared in the development of the proposed action and the biological opinion. The biological opinion is then reviewed and finalized by the Regional Office processing the consultation. This ensures a good balance between independent review and timely permit processing. The non-jeopardy biological opinion may also be finalized and signed by the Field Office supervisor, if the Regional Director and the Assistant Director for Ecological Services have delegated the authority to do so.

Regional Office Divisions of Endangered Species have lead coordination responsibilities for national and inter-regional consultations. In addition, Regional Offices provide oversight of the consultation program for quality control. For expedience in processing consultations, a Service Project Leader may assume the lead responsibility for formal consultation in multi-agency actions if the Service's role is significant.

All Project Leaders have a continuing responsibility to determine if discretionary ongoing activities of the Service (no matter when the activities were initiated) comply with these guidelines and procedures.

## Appendix 1

### **EXAMPLES OF STEP-BY-STEP PROCEDURES FOR INTRA-SERVICE SECTION 7 CONCURRENCE, FORMAL CONSULTATION, AND CONFERENCE**

#### A. Intra-Service Section 7 Concurrence

**Situation:** The Division of Federal Aid (FA) receives a project proposal from a State. The project is eligible for funding under the Wildlife Restoration Grant Program.

**Step:**

1. The Project Leader assesses which listed, proposed, candidate species and proposed or designated critical habitats may occur within action areas. The Project Leader has the option of requesting a list of listed, proposed, candidate species and proposed or designated critical habitats from the ESO. This request includes information on the specifics of the State request. Within 30 days of receiving the request, ESO furnishes FA with a list of species that may be present in the action area. Or, the Project Leader provides a list of species/critical habitats to the ESO for ESO concurrence.
2. Upon receipt of any requested species information, FA conducts a "may affect" analysis on listed, proposed, and candidate species.
3. If a "may affect" determination is made, then FA completes the Service Evaluation Form and determines the action "is not likely to adversely affect" the listed, proposed, candidate species, or designated/proposed critical habitats and requests in writing that the ESO concur with this evaluation.
4. ESO responds within 30 days of receiving FA's request that there is concurrence, and therefore no need for formal intra-Service section 7 consultation.
5. If FA determines "no effect," then a request for concurrence is unnecessary. If species/critical habitats are present but the Project Leader determines there will be no affect, he/she may proceed with the funding proposal.

## B. Intra-Service Section 7 Formal Consultation

Situation: The Division of Fisheries (DF) receives a request from a State for an action.

### Step:

1. The Project Leader assesses which listed, proposed, candidate species and proposed or designated critical habitats may occur within action areas. To assist in this determination DF may request a list of listed, proposed, and candidate species from the ESO. This request includes information on the specifics of the State request.
2. Within 30 days of receiving the request, the ESO furnishes DF with a list of species that may be present in the action area.
3. Upon receiving any requested species information, DF conducts a "may affect" analysis on listed, proposed, and candidate species that ESO said may be present.
4. DF concludes that the proposed action is likely to adversely affect listed species.
5. DF requests, in writing, initiation of formal intra-Service section 7 consultation. A completed Service Evaluation Form is submitted with the request.
6. ESO acknowledges the request for formal intra-Service section 7 consultation.
7. ESO prepares the draft biological opinion and submits to the ARD/ES for review.
8. The RD signs the biological opinion and forwards it to DF with a copy to the ARD/DF.

## C. Intra-Service Section 7 Conference

Situation: Refuges proposes an action in an area containing a proposed or candidate species.

### Step:

1. The Project Leader assesses which listed, proposed, candidate species and proposed or designated critical habitat may occur within action areas. To assist in this

determination, Refuges may request a list of listed, proposed, and candidate species from the ESO. This request includes information on the specifics of the request.

2. Within 30 days of receiving the request, the ESO furnishes Refuges with a list of species that may be present in the action area.
3. Upon receiving any requested species information, Refuges conducts a "may affect" analysis on listed, proposed, and candidate species that ESO said may be present.
4. Refuges works with the ESO to assess whether or not their proposed action may jeopardize the continued existence of the proposed or candidate species. Refuges evaluates their proposal for its potential effect on the proposed or candidate species.
5. As a result of the evaluation, Refuges concludes their proposal is likely to jeopardize the proposed or candidate species. Refuges requests conference with ESO on the Service Evaluation Form and asks for additional information.
6. The conference is held and ESO submits a draft conference report (the format follows that of a biological opinion issued through formal consultation) to the ARD/ES for review. The report contains advisory recommendations for minimizing or avoiding adverse effects.
7. The Regional Director signs the conference report and forwards it to Refuges with a copy to the ARD/Refuges. Refuges reviews the conference opinion and implements the actions that will avoid adverse effects to the proposed or candidate species.

Appendix 2

**INTRA-SERVICE SECTION 7 BIOLOGICAL EVALUATION FORM**

**[Note: This form provides the outline of information needed for intra-Service consultation. If additional space is needed, attach additional sheets, or set up this form to accommodate your responses.]**

**Originating Person:**

\_\_\_\_\_  
**Telephone Number:**

\_\_\_\_\_  
**Date:** \_\_\_\_\_

**I. Region:**

**II. Service Activity (Program)**

**III. Pertinent Species and Habitat:**

- A. Listed species and/or their critical habitat within the action area:**
- B. Proposed species and/or proposed critical habitat within the action area**
- C. Candidate species within the action area:**
- D. Include species/habitat occurrence on a map.**

**IV. Geographic area or station name and action:**

**V. Location (attach map):**

- A. Ecoregion Number and Name:**
- B. County and State:**



**C. Section, township, and range (or latitude and longitude):**

**D. Distance (miles) and direction to nearest town:**

**E. Species/habitat occurrence:**

**VI. Description of proposed action (attach additional pages as needed):**

**VII. Determination of effects:**

**A. Explanation of effects of the action on species and critical habitats in items III. A, B, and C (attach additional pages as needed):**

**B. Explanation of actions to be implemented to reduce adverse effects:**

**VIII. Effect determination and response requested: [\* = optional]**

**A. Listed species/designated critical habitat:**

**Determination**

**Response requested**

no effect/no adverse modification

(species: \_\_\_\_\_) \_\_\_\_\_ \*Concurrence

may affect, but is not likely to adversely

affect species/adversely modify critical habitat

(species: \_\_\_\_\_) \_\_\_\_\_ Concurrence

may affect, and is likely to adversely

affect species/adversely modify critical habitat

(species: \_\_\_\_\_) \_\_\_\_\_ Formal Consultation

**B. Proposed species/proposed critical habitat:**

**Determination**

**Response requested**

**no effect on proposed species/no adverse  
modification of proposed critical habitat**

(species: \_\_\_\_\_) \_\_\_\_\_ **\*Concurrence**

**is likely to jeopardize proposed species/  
adversely modify proposed critical habitat**

(species: \_\_\_\_\_) \_\_\_\_\_ **Conference**

**C. Candidate species:**

**Determination**

**Response requested**

**no effect**

(species: \_\_\_\_\_) \_\_\_\_\_ **\*Concurrence**

**is likely to jeopardize candidate species**

(species: \_\_\_\_\_) \_\_\_\_\_ **Conference**

\_\_\_\_\_  
**signature**  
**[Title/office of supervisor at originating  
station]**

**IX. Reviewing ESO Evaluation:**

**A. Concurrence \_\_\_\_\_ Nonconcurrence \_\_\_\_\_**

**B. Formal consultation required \_\_\_\_\_**

**C. Conference required \_\_\_\_\_**

**D. Informal conference required \_\_\_\_\_**

**E. Remarks (attach additional pages as needed):**

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**signature**  
**date**  
**[Title/office of reviewing official]**

## INSTRUCTIONS

**Originating Person:** The person(s) or unit (field office, refuge, program) proposing an action for which the Intra-Service Section 7 Biological Evaluation Form is being prepared.

**Date:** Date the information on the form was finalized.

**I. Region:** The Region in which the proposed action will occur.

**II. Service activity:** The Service program initiating the proposed action.

**III. Pertinent species and habitat.**

**A. Listed species and/or their critical habitat within the action area:** The action area includes the immediate area where the proposed action will occur, as well as any other areas where direct or indirect impacts of the action may be expected. For example, effects of an action in the headwaters of a stream may affect endangered fish that occur 20 miles downstream. A compilation of listed species or critical habitats that possibly occur in the action area may be generated by the Project Leader, or it may be requested from the appropriate ESO.

Note: All experimental populations of listed species are treated as threatened species. However, for the purposes of intra-Service section 7 consultation, they are treated as species *proposed* for listing if they occur off National Wildlife Refuge or National Park System lands and they are classed as "non-essential" experimental populations.

List all threatened and endangered species and critical habitat that may be affected by the proposed action. An effect exists even if only one individual or habitat segment may be affected. Consider both beneficial and adverse effects, regardless of their magnitude.

It is necessary to list all threatened and endangered species and critical habitats in the action area that will not be affected at any level of significance. This informs the reviewer that such species have been considered.

**B. Proposed species and/or proposed critical habitat within the action area:** Lists of proposed species and critical habitat that could occur in the action area may be generated by the project leader or may be requested from the appropriate ESO.

List all species and habitats in the action area for which a proposed listing rule (but not a final rule) or proposed critical habitat designation has been published in the Federal

Register. The list should include not only proposed species that may be affected, but also those that will not be affected. Use the same consideration as in Item III (A) above.

**C. Candidate species within the action area:** Service actions shall include consideration of candidate species as though proposed for listing. Lists of candidate species that could occur in the action area may be generated by the project leader or may be requested from the appropriate ESO.

List all candidate species that may be affected by the proposed action. Because listing candidates may be added to, or dropped from, candidate species lists between the typically biannual printings of the Notice of Review, it is necessary to check candidate lists with the appropriate ESO.

Include in the list of candidate species in the action area those that will not be affected by the proposed action.

#### **IV. Geographic area or station name and action:**

Briefly describe the proposed action and where it will occur. (For example: The proposed action is to directly stock, or transfer to the State of X for stocking, channel catfish and smallmouth bass. These stockings would occur in both Blue Water and Minnow River drainages). A more detailed description of the proposed action will be presented under Section VI.

#### **V. Location (attach map):**

In addition to the following four specific descriptions, it is vital to attach a map(s). The reviewer may not be familiar with the project area and will need the maps to precisely relate the proposed project to the affected species. Maps should depict, preferably in large scale, the exact locations of project elements. The maps should include section, township, and range, or latitude and longitude. Topographic maps are preferred, with the action area depicted on them.

**A. Ecoregion Number and Name:** Self-explanatory

**B. County and State:** Self-explanatory.

**C. Section, township, and range (or latitude and longitude):**

Locate the project area as precisely as possible. If the action is stocking a small stock tank, the descriptor should include at least quarter section and preferably quarter/quarter section. For scattered project sites, such as in fish stocking, a location should be given for each site.

**D. Distance (miles) and direction to nearest town:** Self-explanatory.

**E. Species/habitat occurrence:** Depict on the location map the species and habitat occurrences.

**VI. Description of proposed action:**

What is the purpose of this proposed action and how do you plan to accomplish it? Describe the project area as well as the project. These descriptions should be detailed enough so that the reviewer can fully understand what the components of the action include and how the project will affect the species. Do not assume that the reviewing office will understand procedures that are taken for granted within your program. Details can be provided here, or by attaching copies of project plans, management plans, stocking schedules, or other project documents. National Environmental Protection Act documents are usually helpful attachments. Sketches or blueprints of the proposed action should be attached. Proposed project dates should be provided. Attach a biological assessment if the project is considered a "major construction activity." Include any measures agreed to through informal consultation to reduce any adverse impacts.

**VII. Determination of effects**

**A. Explanation of effects of the action:**

Discuss either the effects of the action on each listed, proposed, or candidate species and critical habitat in the action area, or why those species or critical habitats will not be affected. For species or critical habitats affected by the proposed action, provide the following information: [Note: candidate species will have no proposed critical habitat.]

- (1) Status of species in action area; is it native (natural and/or stocked) or non-native in the action area? Include population and/or distribution trends (provide survey information).

- (2) Species habitat in the action area and its significance to spawning, feeding, migratory habits (or behavior), cover, roost, etc. Is the area currently occupied or unoccupied historic range for the species?
- (3) Impacts of the proposed action on species and/or critical habitat, including direct, indirect, interdependent, interrelated, and cumulative impacts.
- (4) Quantification of effects - acres of habitat, miles of habitat, number of individuals, etc.
- (5) Summary of effects - include the basis for your conclusion - best judgment, literature, citations, studies, etc.

**B. Describe, if known, project modifications that would promote the conservation of the affected species.** Project modification ideas may be found in recovery plans. Although section 7 of Act prohibits only those actions by Federal agencies which are likely to jeopardize listed species or adversely modify critical habitat, the Service has a commitment to recovering listed species and trying to prevent the need to list additional species.

#### **VIII. Effect determination and response requested:**

Enter the species in the appropriate determination. For each determination, place an X on the response requested.

##### **A. Listed species/critical habitat:**

**No effect/no adverse modification.** This conclusion is reached if the proposed action and its interrelated and interdependent actions will not directly or indirectly affect listed species or destroy/adversely modify designated critical habitat. Formal section 7 consultation is not required when the no effect conclusion is reached. However, a request for the optional written concurrence is encouraged to facilitate a complete administrative record.

**May Affect, but is not likely to adversely affect species/adversely modify critical habitat.** This conclusion is appropriate when effects to the species or critical habitat are expected to be discountable, insignificant, or completely beneficial. Beneficial effects are contemporaneous positive effects without any adverse effects to the species or habitat. Insignificant effects relate to the size of the impact (and should never reach the scale where take occurs), while discountable effects are those that are extremely unlikely to

occur. Based on best judgment, a person would not: (1) be able to meaningfully measure, detect, or evaluate insignificant effects; or (2) expect discountable effects to occur. If the ESO concurs in writing with the Project Leader's determination of "is not likely to adversely affect" listed species or critical habitat, the intra-Service section 7 consultation process is completed.

If formal section 7 consultation is required for other species affected by this proposed action, then it may be easier and less confusing to fold the "is not likely to adversely effect" concurrence into the formal section 7 consultation rather than doing a separate concurrence.

**May affect, and is likely to adversely affect species/adversely modify critical habitat.** This conclusion is reached if any adverse effect to listed species or critical habitat may occur as a direct or indirect result of the proposed Service action or its interrelated or interdependent actions, and the effect is not discountable, insignificant or beneficial (see definition of "is not likely to adversely affect". In the event the overall effect of the proposed action is beneficial to the listed species or critical habitat, but may also cause some adverse effect on individuals of the listed species or segments of the critical habitat, then the determination should be "is likely to adversely affect." Such a determination requires formal section 7 consultation.

Example: A refuge proposes prescribed burning for a prairie remnant to improve the habitat for the endangered Karner blue butterfly. The burn will substantially improve the habitat for the species and promote its recovery in subsequent years. However, individual Karner blue butterfly eggs and larvae will be killed during the burn. Even though the net effect of the burn will be highly beneficial to the listed species, the burn must be considered to have an adverse effect. A finding of "is likely to adversely affect" is necessary.

#### **B. Proposed species/proposed critical habitat:**

**No effect on proposed species/no adverse modification of proposed critical habitat.** This conclusion is reached if the proposed action and its interrelated and interdependent actions will not directly or indirectly affect proposed species or proposed critical habitat. A request for the optional written concurrence is encouraged.

**Is likely to jeopardize proposed species/adversely modify proposed critical habitat.** For proposed species and proposed critical habitats, the Service is required to evaluate whether the proposed Service action is likely to jeopardize the continued existence of the proposed species or adversely modify an area proposed for designation as critical



habitat. If this conclusion is reached, a section 7 conference is required. If this conclusion is reached, intra-Service conference is required.

**C. Candidate species:**

**No effect on candidate species.** This conclusion is reached if the proposed action and its interrelated and interdependent actions will not directly or indirectly affect candidate species. A request for the optional written concurrence is encouraged.

**Is likely to jeopardize candidate species.** For candidate species, the Service is required to evaluate whether the proposed Service action is likely to jeopardize the continued existence of the candidate species. If this conclusion is reached, intra-Service section 7 conference is required.

## **APPENDIX F - FWS/NMFS REGIONAL & FIELD OFFICES HANDLING SECTION 7 CONSULTATIONS**

## U.S. FISH & WILDLIFE SERVICE

Region 1: CA, HI, ID, NV, OR, WA, American Samoa, Territories of the Pacific Islands

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## **APPENDIX G - EXEMPTION PROCESS**

### **The Section 7 Exemption Process**

To respond to situations where Federal agency actions would be prevented from going forward due to the "jeopardy" prohibition of section 7(a)(2) without further opportunity for review, Congress added an exemption procedure through the 1978 Amendments to the Act. That procedure was substantially amended through the Endangered Species Act Amendments of 1979 and 1982; implementing regulations have been codified at 50 CFR §§450-453.

The following summarizes the exemption process.

#### **1. Federal actions subject to the exemption process**

Any Federal action which, after consultation under section 7 of the Act, has resulted in a biological opinion which concludes that the action is likely to jeopardize the continued existence of a listed species or destroy or adversely modify critical habitat of a listed species, may pursue an exemption.

#### **2. Initiating the exemption process**

Following completion of formal consultation, the Federal agency, the Governor of the State in which the action is proposed, or the permit or license applicant may initiate the exemption process. A "permit or license applicant" is defined by the Act as the person whose application to a Federal agency for a permit or license has been denied primarily because of the application of section 7(a) to that agency action.

Within the Department of the Interior, the exemption process is administered by the Assistant Secretary for Policy, Management and Budget, rather than the FWS.

#### **3. Prerequisites for consideration**

In order to be accepted for consideration, an application must satisfy the following conditions. The Federal agency and the applicant must have:

- carried out the consultation responsibilities in good faith and made a reasonable and responsible effort to develop and fairly consider modifications or reasonable and prudent alternatives to the proposed action;

- conducted any required biological assessment; and
- refrained from making any irreversible or irretrievable commitment of resources during consultation.

#### **4. Exemption process**

- a. An application for exemption is filed within 90 days of completion of consultation (for Federal agencies) or within 90 days of completion of the agency's final formal action on the permit or license (for non-Federal applicants).
- b. The Secretary of the Interior (or Commerce) conducts a threshold review of the application to determine whether the prerequisites for consideration have been met (20 days or longer if agreed to by the exemption applicant). Any negative finding made by the Secretary on the threshold review would constitute final agency action and terminate the exemption process.
- c. If the applicant passes the threshold review, the appropriate Secretary then holds a Administrative Procedure Act formal hearing on the application (presided over by an Administrative Law Judge). The purpose of the hearing is to allow the submission of appropriate evidence and the compilation of the agency record. The Secretary submits a report to the Committee within 140 days (or longer if agreed to by the exemption applicant) of the initial determination. The Secretary's report to the Committee must consider the following:
  - the availability of reasonable and prudent alternatives, the nature and extent of benefits of the agency action, and alternative courses of action consistent with conservation of the species or critical habitat;
  - a summary of evidence concerning whether the agency action is in the public interest and is of national or regional significance;
  - appropriate reasonable mitigation and enhancement issues to be considered by the Committee; and
  - whether the agency and applicant refrained from making any irreversible or irretrievable commitment of resources during consultation.



- d. The Committee consists of 7 members: the Secretary of Agriculture; the Secretary of the Army; the Chair of the Council of Economic Advisors; the Administrator of the Environmental Protection Agency; the Secretary of the Interior (who serves as the Chairman); the Administrator of the National Oceanic and Atmospheric Administration; and one individual from each affected State (appointed by the President). The Committee makes its final determination within 30 days of receipt of the report. An affirmative vote of 5 members is required to grant an exemption. State representatives share one vote, when more than one State is represented on the Committee.

## 5. Potential outcomes

There is little administrative history reflecting the likely outcome of the Committee's review. To date only three cases have completed the entire review process:

- Tellico Dam posed jeopardy to the snail darter. The Committee voted 7 to 0 not to grant an exemption. [An Appropriations Act rider subsequently allowed the dam to be completed.]
- Grayrocks Dam on the Platte River posed **jeopardy** to the whooping crane. An exemption was granted, but the Committee required that the agency adopt the reasonable and prudent alternative that had been determined in the biological opinion.
- BLM timber sales in Oregon posed **jeopardy** to the northern spotted owl. An exemption was granted for 13 of 44 sales covered by the application. The 13 exempted sales were subject to a mitigation measure requiring BLM to implement the recovery plan for the owl as expeditiously as possible. The remaining sales remain subject to the reasonable and prudent alternatives provided in the biological opinion. This Committee action was challenged in court on the basis of infringement of the Administrative Procedure Act during the deliberations of the Committee. The application was subsequently withdrawn.

Three other applications were withdrawn by the applicant prior to Committee review.

- Pittston (oil refinery in Maine) was enjoined from further action on the proposal by related Court action and dropped their application;

- an application filed relative to dredging in the Suwannee River was withdrawn when it was determined that the contractor filing the request did not represent the applicant involved; and
- a barge fleeting permit on the Ohio River was withdrawn by the applicant prior to the administrative hearing.

One application was denied.

- 25 farmers applied for an exemption for the Montgomery County Conservation District.

The Committee must grant an exemption if the Secretary of Defense finds it is necessary for reasons of national security, and the President may grant an exemption to restore public facilities in declared natural disaster areas under certain circumstances.

An exemption cannot be granted if the Secretary of State finds that such an action would be a violation of an international treaty or other obligation of the United States.

## **APPENDIX H - INTERAGENCY MOA ON STREAMLINED CONSULTATIONS**

NOTE: The MOA had not been signed when this handbook went to print. A copy of the signed MOA will be provided for insertion as Appendix H.